Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of Petition for Declaratory Ruling in Response to Primary Jurisdiction Referral, *Autauga County Emergency Management Communication District et al. v. BellSouth Telecommunications, LLC*, No. 2:15-cv-00765-SGC (N.D. Ala.)	WC Docket No. 18-_____

PETITION OF THE 911 DISTRICTS OF AUTAUGA COUNTY, CALHOUN COUNTY, MOBILE COUNTY, AND THE CITY OF BIRMINGHAM FOR A DECLARATORY RULING REGARDING THE MEANING AND APPLICATION OF THE DEFINITION OF INTERCONNECTED VOIP SERVICE SET FORTH IN 47 C.F.R. § 9.3

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SUMMARY

Four 911 districts in Alabama filed suit against BellSouth Telecommunications alleging that BellSouth failed to bill, collect, and remit 911 fees in accordance with Alabama's 911 statute on its services that qualify as "VoIP or similar technology." The federal district court referred the case to the Commission for guidance on the application of statutes and regulations pertaining to Interconnected VoIP—specifically how to evaluate whether certain services delivered by BellSouth to its business customers in Alabama constitute IVoIP.

In this petition, the 911 districts request that the Commission declare that Internet-protocol customer premises equipment, as that phrase is used in the definition of IVoIP (47 C.F.R. § 9.3), encompasses all equipment that transmits, processes, or receives IP packets located on or within the customer's or building owner's premises. This conclusion is mandated by, among other authorities, 47 U.S.C. § 153, which defines CPE as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications." A declaration clarifying the practical application of the definition of CPE will assist the parties and the district court in determining whether certain business telephone services (that will be explored and better understood through discovery) qualify IVoIP.

The 911 districts also assert in this petition that the district court did not refer the issue of federal preemption of Alabama's 911 statute and that any such questions are more properly addressed by the district court. Alternatively, if the Commission decides to weigh-in on the question of whether federal law preempts Alabama's 911 statute as it applies to VoIP, the 911 districts contend that the clear answer is "no." Congress has not expressly preempted states from collecting 911 fees on IVoIP, VoIP, or similar telephone services. In fact, the Commission has long recognized the rights of states to pass laws that provide for the funding of 911 emergency

services. There is no conflict between Alabama's statute imposing 911 fees on all wired telephone service, including IVoIP, and the Communications Act. The rate or amount of the 911 fees imposed by the Alabama statute on VoIP service is the same as the rate or amount assessed on traditional telephone service. In light of that fact, the Communications Act does not preempt Alabama's 911 statute where the statute imposes a 911 fee on every 10-digit access number for VoIP services while imposing a 911fee on every exchange access line for local exchange service.

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Responding to the district court's primary jurisdiction referral in *Autauga County Emergency Management Communication District et al. v. BellSouth Telecommunications, LLC*, No. 2:15-cv-00765-SGC (N.D. Ala.), the 911 districts for Autauga County, Calhoun County, Mobile County, and the City of Birmingham (all in the State of Alabama) (the "Districts") hereby petition the Federal Communication Commission (the "Commission") for a declaratory ruling concerning the meaning and application of the Commission's definition of "Interconnected VoIP service" ("interconnected VoIP" or "IVoIP") as set forth in 47 C.F.R. § 9.3. More particularly, the Districts seek the Commission's clarification and guidance regarding the facts and law relevant to identifying customer premises equipment ("CPE") for purposes of applying the definition of IVoIP under 47 C.F.R. § 9.3.

For the reasons set forth below, the Districts submit that the Commission should declare (1) that all equipment located on or within the building or premises owned or occupied by the

customer that transmits, processes, or receives IP packets is presumptively on the customer's side of the network and qualifies as IP CPE for purposes of applying 47 C.F.R. § 9.3; and (2) that the federal district court and not the Commission is the appropriate forum to resolve questions between the parties regarding the meaning and preemptive scope of 47 U.S.C. § 615a-1(f)(1). Further, if the Commission concludes that it should address the preemptive scope of 47 U.S.C. § 615a-1, the Commission should find (1) that neither that provision of the Communications Act nor any other federal law preempts the ability of states to impose E911 fees on voice services other than those that meet the Commission's definition of IVoIP if such voice services enable users to take advantage of E911 services and such fees are used to support the provision of E911 services; and (2) 47 U.S.C. § 615a-1(f)(1) only prohibits states from imposing different *rates* on providers of IVoIP and local exchange services, not from obtaining higher total revenues from providers of IVoIP than from providers of local exchange services.

The Background section that follows is the joint work product of the Districts and BellSouth Telecommunications, LLC ("BellSouth") and, therefore, BellSouth's respective petition for a declaratory ruling will have the same Background section. Conversely, the following Questions Presented and Argument sections are solely the work product of the Districts and, consequently, assert the Districts' views and understandings of the foregoing matter.

BACKGROUND

A. In the Alabama Action, Plaintiffs and BellSouth Disagree over the Scope of Services That Fall Within the Commission's Definition of Interconnected VoIP, 47 C.F.R. § 9.3

The 911 districts for Autauga County, Calhoun County, Mobile County, and the City of Birmingham in Alabama (the "Districts") have filed a lawsuit (the "Alabama Action")[1] against BellSouth for allegedly under-billing 911 charges to its business customers under Alabama's 911 statute, known as the Emergency Telephone Services Act ("ETSA").[2] The Districts allege that BellSouth failed to bill its customers all the 911 charges that the ETSA required and, therefore, failed to collect and remit all the 911 charges the ETSA required. *See, e.g.*, Am. Compl. ¶¶ 32, 36-37, 42, 48, 51, 57. The Districts have not alleged that BellSouth wrongfully retained any of the 911 charges that it collected. Rather, the Districts allege that BellSouth did not bill 911 charges on every "10-digit access number[ ]" provided to users of "VoIP or similar service," as the Districts contend was required by Alabama Code § 11-98-5.1(c). *Id.* ¶ 26. They further claim that BellSouth is liable to the Districts for the amount of 911 charges that BellSouth failed to bill, plus interest. *See, e.g.*, *id.* ¶¶ 32-33.

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[1] *Autauga Cty. Emergency Mgmt. Commc'n Dist. v. BellSouth Telecomms., LLC*, No. 2:15-cv-00765-SGC (N.D. Ala.). The Alabama Action was originally filed in Alabama state court and removed to federal court. *See* Dkt. 1, https://bit.ly/2wTz63r. Citations to "Dkt." are to the federal court docket.

[2] In 2012, the Alabama legislature enacted a law that significantly amended the ETSA, effective October 1, 2013. *See* Ala. Laws Act 2012-293. The Alabama Action and the issues presented by this petition relate to 911 charges imposed before October 1, 2013, under the pre-amendment version of the statute. Amended Complaint ("Am. Compl.") ¶ 30 (Dkt. 19), https://bit.ly/2wTxGGP. Unless otherwise noted, all citations to the ETSA are to the version of the statute in effect through September 30, 2013, which was codified at Alabama Code §§ 11-98-1 to 11-98-15.

In their Amended Complaint, the Districts refer to the Commission's definition of interconnected VoIP and allege that "[m]uch of the Defendant's service in these districts qualifies as 'Interconnected VoIP Service' (and did so prior to October 1, 2013)." *Id.* ¶¶ 22-24. The Districts further allege that BellSouth "had a duty to bill, collect, and remit a 911 charge on every telephone number" for its "VoIP or similar service" (as the phrase is used in the ETSA). *Id.* ¶ 25.

The parties agree that, for local exchange access service, the ETSA required telephone companies to "collect one E911 charge for each voice pathway capable of local exchange service, subject to the statutory limit of 100 charges per person, per location." *Madison Cty. Commc'ns Dist. v. BellSouth Telecomms., Inc.*, 2009 WL 9087783, at *12 (N.D. Ala. Mar. 31, 2009).[3]

BellSouth has disputed the Districts' claims. BellSouth maintains that its only VoIP offering in Alabama during the relevant time period (before October 1, 2013) was its residential VoIP offering, U-verse, which it properly classified and billed as VoIP under the ETSA.[4] BellSouth maintains further that it offered no business VoIP products during the relevant time period; rather, it offered to business customers only TDM and other traditional telephone services, including ISDN PRI.

[3] The Districts acknowledge that the statutory limit of 100 charges per person, per location also applies to "VoIP or similar service."

[4] The Districts' allegations concern BellSouth's "business telephone service" that purportedly qualifies as VoIP, not BellSouth's residential VoIP service. Am. Compl. ¶ 3. BellSouth further maintains that the phrase "VoIP or similar service" in the ETSA "must be read in light of the FCC's definition of interconnected VoIP." Primary Jurisdiction Referral Order at 10-11 (Dkt. 52), https://bit.ly/2M72itn. BellSouth also maintains that, during the relevant period, it did not offer any business products in Alabama that were "similar" to VoIP. *See Madison Cty.*, 2009 WL 9087783, at *8 n.43 ("agree[ing] with BellSouth that . . . channelized service is not a similar technology to VoIP" because "channelized services . . . are circuit-switched technologies, [while] VoIP is a packet-switched technology").

The Districts disavow BellSouth's factual contentions concerning the nature and characteristics of its business voice service for several reasons. The Districts believe that BellSouth was, in fact, providing business VoIP or similar service during the relevant time period. The Districts requested specific information about the specifications and configurations of BellSouth's voice service delivered to business customers and contend that BellSouth has not yet produced the requested documents that relate to BellSouth's factual assertions concerning its voice service products.

B. BellSouth and the Districts Also Disagree as to Whether Alabama's ETSA Conflicts with the Communications Act, 47 U.S.C. § 615a-1(f)(1)

The Districts and BellSouth also dispute the meaning and preemptive scope of 47 U.S.C. § 615a-1(f)(1), which, among other things, affirms the authority of state and local governments to impose 911 charges on subscribers of "IP-enabled voice services,"[5] and states that, "[f]or each class of subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services." 47 U.S.C. § 615a-1(f)(1). In addition, the Districts and BellSouth also disagree about whether the District Court or the Commission is the appropriate forum for the resolution of these disputes. The parties address their respective positions on these disputes in their petitions.

C. The Issues Referred to the Commission

Following discovery responses and correspondence that clarified the nature of the parties' disputes, BellSouth moved for a primary jurisdiction referral to the Commission. The district court

[5] The Communications Act defines "IP-enabled voice service" to have "the meaning given the term 'interconnected VoIP service' by [47 C.F.R. § 9.3]." 47 U.S.C. § 615b(8).

granted the motion, referred the case to the Commission for further guidance, and stayed the case. Primary Jurisdiction Referral Order at 14 (Dkt. 52). The court noted that the Districts contend that VoIP includes, among other things, "ISDN PRI services provisioned to a customer over fiber-optic facilities — if the customer also receives IP connectivity." *Id.* at 8. The court concluded that "[t]he FCC has the expertise to competently and consistently determine what constitutes VoIP service" and to "parse these technical terms of art." *Id.* at 9. The court reasoned that, even though this case involves an Alabama statute, "Congress has recognized the FCC's authority in this area by codifying 911 VoIP obligations and allowing the FCC to periodically modify the category of subject services." *Id.* at 9-10. The court held that "'VoIP or other similar service' under the ETSA must be read in light of the FCC's definition of interconnected VoIP." *Id.* at 10-11. Thus, "interpreting the ETSA's classification of VoIP or similar services implicates federal law." *Id.* at 10.

The court also concluded that there was "a need for uniformity regarding classification of VoIP services" because "numerous federal and state laws as well as FCC rules regarding VoIP would be implicated if the Districts' contentions are correct." *Id.* at 11. The court took account of the Commission's "professed desire for uniformity in the field of VoIP regulation," citing the Commission's amicus brief in *Charter*. *Id.* at 12 (citing Br. of FCC as Amicus Curiae in Supp. of Plaintiffs-Appellees, *Charter Advanced Servs. (MN), LLC v. Lange*, No. 17-2290 (8th Cir. filed Oct. 27, 2017) ("*Charter* Commission Br."), https://bit.ly/2wo08jL).

Following the district court's referral, counsel for BellSouth and the Districts engaged in further discussions among each other and with the Commission's staff, which clarified the nature of the issues in dispute and the nature of the issues on which the Commission could provide guidance through a declaratory ruling. BellSouth and the Districts continue to dispute, as a factual

matter, the nature of the services BellSouth provided in Alabama during the relevant time period. However, BellSouth and the Districts agree that these factual disputes will be for the district court (and/or a jury) to resolve following the Commission's resolution of this proceeding.

In light of these factual disputes and the district court's primary jurisdiction referral, as well as primary jurisdiction referral decisions in two other courts,[6] BellSouth and the Districts agreed upon several hypothetical factual scenarios for the delivery to a customer of both voice service and broadband Internet access service over the same last-mile facility.[7] These scenarios are depicted in diagrams contained in an Appendix to each petition.

Scenario 1 depicts a hypothetical customer that buys both a voice service and an Internet access service that are transmitted using TDM over the last-mile facility[8] connecting the telephone company's central office (the box on the left) and a customer premises. The TDM multiplexer (or "MUX") at the customer premises sends the voice service to a TDM private branch exchange ("PBX") and the Internet service to an IP router, which in turn send those services to analog phones and computers, respectively. Both the Districts and BellSouth agree that Scenario 1 depicts a voice service that is neither an interconnected nor a non-interconnected VoIP service.

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[6] *See* Order Granting Stay, *State ex rel. Phone Recovery Servs., LLC v. Verizon Bus. Glob.*, Nos. 2016-CA-000062 *et al.* (Fla. Cir. Ct. Leon Cty. May 17, 2018); Order of Court, *Phone Recovery Servs., LLC v. Verizon Pa., Inc.*, No. GD-14-021671 (Pa. Ct. Comm. Pl. Allegheny Cty. Aug. 9, 2018). Counsel for BellSouth is also counsel for the AT&T defendants in those other cases. In addition, the founder of Phone Recovery Services, Roger Schneider, is a consultant to the Alabama plaintiffs and counsel for Phone Recovery Services in both Florida and Pennsylvania has been representing the Districts in the proceedings before the Commission.

[7] Because the customer in each scenario is purchasing Internet access service, BellSouth and the Districts recognize that the customer has the ability also to use that Internet access service in connection with an over-the-top VoIP service (whether interconnected or non-interconnected). The classification of such services is not at issue in the Alabama Action or in this referral.

[8] The red-blue striping on the last-mile facility is meant to symbolize TDM multiplexing.

Scenario 2 is the same in all respects as Scenario 1, except that the voice and Internet access services are sent over separate wavelengths on the same last-mile fiber-optic facility.[9] That fiber-optic facility terminates in a Wave Division Multiplexer that also has both TDM and IP capability. Both the Districts and BellSouth agree that Scenario 2 depicts voice service that is neither an interconnected nor a non-interconnected VoIP service.

Scenarios 3a and 3b are also the same in all respects as Scenario 1, except that the voice and Internet access services are sent over the last-mile facility using Ethernet transmission.[10] The last-mile facility terminates in an Ethernet MUX. In Scenario 3a, the Ethernet MUX is on the carrier side of the network demarcation point. In Scenario 3b, the Ethernet MUX is on the customer side of the network demarcation point. BellSouth and the Districts disagree about the facts that are relevant in determining, as a matter of law, whether a piece of equipment, such as the Ethernet MUX in Scenarios 3a and 3b (or the equipment depicted in Scenarios 4a-b and 5a-c), is on the carrier's side or the customer's side of the network demarcation point. The parties' positions on this issue are articulated in their petitions. The Districts and BellSouth agree that both Scenario 3a and Scenario 3b depict a voice service that is neither an interconnected nor a non-interconnected VoIP service.

In Scenarios 4a and 4b, the customer purchases both a voice and an Internet access service that are transmitted in IP over the last-mile facility, which terminates in CPE that has IP capability. That equipment also converts the voice service to TDM for delivery to the customer's

[9] The solid blue and red lines on the last-mile facility are meant to symbolize the different wavelengths.

[10] The blue and red checkerboard pattern on the last-mile facility in these diagrams and in each of the remaining diagrams is meant to symbolize the use of packets: Ethernet packets in Scenarios 3a and 3b; IP packets in Scenarios 4a, 4b, 5a, 5b, 5c, and 6.

TDM PBX and delivers the Internet service to an IP router. In Scenario 4a, the IP Equipment that also performs the TDM conversion is on the carrier's side of the network demarcation point. In Scenario 4b, that IP Equipment is on the customer's side of the network demarcation point. The Districts and BellSouth agree that Scenario 4a depicts a voice service that is neither an interconnected nor a non-interconnected VoIP service and that Scenario 4b depicts an interconnected VoIP voice service.

Scenario 5a is similar to Scenario 4a, except that the customer has an IP PBX. Scenarios 5b and 5c are similar to Scenario 5a, except that the customer has an IP/TDM PBX that converts the IP packets for use with the customer's analog telephones. The difference between Scenarios 5b and 5c are the location of the equipment in which the last-mile facility terminates in relation to the network demarcation point: in Scenario 5b, that equipment is on the carrier's side of the network demarcation point; in Scenario 5c, that equipment is on the customer's side of that point. Both the Districts and BellSouth agree that Scenarios 5a, 5b, and 5c all depict an interconnected VoIP service.

Scenario 6 depicts a customer that purchases an Internet access service and uses it with a hosted or managed VoIP service that rides over the top of the Internet access service. Both the Districts and BellSouth agree that Scenario 6 depicts an interconnected VoIP service.

BellSouth and the Districts agree that guidance from the Commission on the applicability of the interconnected VoIP definition to each of these scenarios will ensure that the Commission's guidance is helpful to the district court regardless of the resolution of factual disputes regarding the nature of BellSouth's services.[11] Although BellSouth and the Districts are in agreement as to

[11] Counsel for BellSouth and the Districts also agree that such guidance will be helpful to the state courts in the Florida and Pennsylvania cases.

the proper classification of the voice services as depicted, they disagree about the legal criteria for identifying the location of the network demarcation point. In addition, the parties recognize that dozens of other telephone companies are defendants in the Florida and Pennsylvania actions. Those telephone companies — or other interested members of the public — may have different positions on the proper classification of the voice services depicted in the various scenarios.

QUESTIONS PRESENTED

A. Questions Relating to the Definition of Interconnected VoIP

The issues referred by the district court to the Commission relate to the meaning and application of the Commission's definition of interconnected VoIP as set forth in 47 C.F.R. § 9.3. More specifically, in 47 C.F.R. § 9.3, the Commission defines interconnected VoIP as a service that:

> **(1)** Enables real-time, two-way voice communications;
>
> **(2)** Requires a broadband connection from the user's location;
>
> **(3)** Requires Internet protocol-compatible customer premises equipment (CPE); and
>
> **(4)** Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

For purposes of applying the above-quoted definition of IVoIP, the Districts seek clarification from the Commission with respect to the relevant facts and appropriate legal standards applicable to determining: (i) the location of the network demarcation point, and (ii) the nature and scope of CPE. The Districts' focus in the underlying Alabama Action is on BellSouth's "integrated" or "converged" service where voice and data travel over the same IP broadband connection to the user's location. Hence, the Districts submit that the areas of disagreement are essentially limited to prong 3 of the above-definition of IVoIP.

The six scenarios attached in the Appendix present various hypothetical forms of integrated services that, for purposes of agreeing on the type of service depicted in each configuration, *presume* various locations for the network demarcation point and, thereby, the extent and nature of the CPE. However, BellSouth and the Districts disagree about the relevance of the network demarcation point. The Districts further contend that some of the scenarios in the Appendix depict demarcation points further inside the customer premises than existing federal law would generally define. In particular, the Districts view the location of the network demarcation points depicted in scenarios 1, 2, 3, 4a, 5a, and 5b as being in conflict with the definition of "customer premise equipment" under 47 U.S.C. § 153. Instead, for the reasons explained below, the Districts submit that the network demarcation points depicted in scenarios 4b, 5c, and 6 are consistent with existing federal definitions (the circumstances/configurations in scenarios 4a and 4b otherwise being factually the same).

The Commission's guidance with respect to the criteria and standards necessary to assign the location of the network demarcation point and identify CPE will assist the district court in determining whether BellSouth's relevant business service offerings (once the exact nature and configuration of those services becomes known through the completion of discovery) constitute IVoIP, a similar service, or a traditional wireline service for purposes of determining BellSouth's compliance with Alabama's ETSA.[12]

[12] BellSouth contends that it did not provide IVoIP or similar services to its business customers in Alabama during the relevant period (residential service is not at issue). Based on various items of information that the Districts have obtained, they believe otherwise (either alone or with an affiliate) and that discovery before the district court will confirm this fact. However, as already acknowledged, such facts are not before the Commission for analysis at this time.

B. Questions Relating to Preemption Under the Communications Act

In its Motion seeking a primary jurisdiction referral, BellSouth also raised questions about federal preemption of the ETSA. The Districts submit that the district court did **not** refer preemption questions to the Commission. Accordingly, this proceeding will raise the following issues relating to preemption:

1. Did the district court refer questions of preemption to the Commission?

2. Is the Commission the proper forum to determine whether federal law preempts the ETSA, or should the district court rule on a pure issue of law that arises in a case before the district court?

3. If the Commission decides to address preemption issues, does 47 U.S.C. § 615a-1 or any other federal law preempt the ability of states to impose E911 fees on voice services other than those that meet the Commission's definition of IVoIP if such voice services enable users to take advantage of E911 services and such fees are used to support the provision of E911 services?

4. If the Commission decides to address preemption issues, then assuming the rate of the E911 fee is the same for IP-enabled voice services and local exchange services, would a state or local government be in violation of 47 U.S.C. § 615a-1 if it required IP-enabled customers to pay an E911 fee for every telephone number capable of accessing the public switched telephone network while customers with local exchange service were required to pay a fee based on the number of access lines provided by their service?

ARGUMENT

The language of the Communications Act, and prior interpretations of the FCC's definition of IVoIP demonstrate that any equipment on a customer's or building owner's physical premises constitutes customer-premises equipment. Therefore, any service that terminates a voice

transmission in IP format in equipment on a customer's or building-owner's premises constitutes a service that requires the use of IP customer premises equipment in satisfaction of the Commission's definition IVoIP. Separately, there is no basis for the Commission to determine that the Communications Act preempts the ETSA both because the Commission is not the proper forum for that decision and because there is no conflict between the Communications Act and the ETSA.

A. Any Equipment On The Customer's Premises That Receives, Transmits, Or Processes IP Packets Constitutes IP CPE, And Voice Service That Uses Such A Device Constitutes VoIP.

The Commission defines IVoIP as any service that (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) ***requires Internet protocol-compatible customer premises equipment (CPE)***; and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.[13] Here, the parties' dispute centers on the third element—whether particular equipment constitutes Internet protocol-compatible customer premises equipment ("IP CPE"). The Commission should interpret the third component of this test—the requirement for IP CPE—to encompass all equipment that transmits, processes, or receives IP packets located on or within the customer's or building owner's premises. Common industry understanding of the terms "IP CPE" and "CPE" as well as the Commission's past guidance regarding those terms compel such a conclusion.

As an initial matter, the meaning and proper application of the Commission's definition of IVoIP starts with and must be grounded in the text of 47 C.F.R. § 9.3, which codifies the

[13] 47 C.F.R. § 9.3.

Commission's definition of IVoIP.[14] In a proceeding like this one that arises from a primary jurisdiction referral, the Commission must only "interpret [its] current regulations and orders."[15] The Commission does not have the power to alter or redefine existing regulations.[16] This is particularly true in a situation such as this, where the activities at issue took place in the past and therefore relate to the application of the Commission's rules in effect at that time. Thus, the Commission must reject any arguments that would require it to alter or disregard the definition in Section 9.3.

Although the Commission does not define "CPE" in Section 9.3, both Congress and the Commission have defined the term consistent with the text's literal or plain meaning, and those definitions should control here. Indeed, it is axiomatic that the plain meaning of statutory or

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[14] *See In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Nos. 17-79, 17-84, 2018 WL 4678555, at *18 (FCC Sept. 27, 2018) ("We start our analysis with a consideration of the text and structure of [the statute at issue]."); *In re Restoring Internet Freedom*, 32 FCC Rcd. 4434, 4442 (2017) (holding that, with respect to statutory interpretation, "[w]e start with the text of the [statute] itself."); *see also Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) ("It is axiomatic that the starting point in every case involving construction of a statute is the language itself." (internal citations and quotations omitted)).

[15] *Bell Atlantic-Delaware, Inc. v. Frontier Comms. Servcs.*, 16 FCC Rcd. 8112, 8120 (2001) ("We are mindful that the Commission has been asked to clarify or revise existing regulations…. But because this has come before us as part of [an adjudicatory] proceeding regarding past behavior, we are constrained to interpret our current regulations and orders.")

[16] *See In re Jt. Pet. Filed By Dish Network, LLC, The U.S.A., And The States Of Cal., Ill., N.C., And Oh. For Dec. Ruling Concerning The Tele. Con. Prot. Act (TCPA) Rules*, 28 FCC Rcd. 6574, 6584 (2013) ("Any revision of this codified interpretation would require a notice-and-comment rulemaking, and is therefore beyond the scope of this adjudicatory proceeding." (citing *Bell Atlantic-Delaware, Inc.*, 16 FCC Rcd. at 8120)); *see also Am. Fed'n of Gov't Employees, AFL-CIO, Local 3090 v. Fed. Labor Relations Auth.*, 777 F.2d 751, 759 (D.C. Cir. 1985) ("[A]n agency seeking to repeal or modify a legislative rule promulgated by means of notice and comment rulemaking is obligated to undertake similar procedures to accomplish such modification or repeal…. Thus, unless and until it amends or repeals a valid legislative rule or regulation, an agency is bound by such a rule or regulation." (internal citations omitted)).

regulatory text is generally conclusive.[17] Here, the plain meaning of "customer premises equipment" is simple—any telecommunications equipment on or in the premises of the customer. Consistent with this plain meaning, in the Communications Act of 1996 Congress defines "customer premise equipment" as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications."[18]

The Commission's definition of CPE must of course be consistent with the Communications Act, and it is. The Commission has defined CPE in reference to the network demarcation point, specifically, as "equipment that falls on the customer side of the demarcation point between customer and network facilities."[19] Similarly, the *Federal Standard 1037(c): Glossary of Telecommunications Terms* provides that customer premises equipment (CPE) is "[t]erminal and associated equipment and inside wiring located at a subscriber's premises and connected with a carrier's communication channel(s) at the demarcation point."[20] "Terminal"

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[17] *See In re App. Of Bascomb Mem. Broadcasting Found.*, 11 FCC Rcd. 4649, 4650 (1996) (citing *KCMC, Inc. v. FCC*, 600 F.2d 546, 549 (D.C. Cir. 1979) ("We approach the issue at hand noting that, in construing a regulation, we must employ the rules of construction generally applicable to statutes. Thus, where the language selected by the drafters is clear and unequivocal, the courts are bound to give effect to the plain meaning of the chosen words and no duty of interpretation arises.")); *see also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982))).

[18] 47 U.S.C. § 153.

[19] *In re Federal-State Jt. Bd. on Universal Services*, 18 FCC Rcd. 10958, 10967 (2003) (internal citation omitted); *see also Charter Advanced Servs. v. Lange*, 903 F.3d 715, 720 (8th Cir. 2018) (adopting the Commission's definition of CPE).

[20] https://its.bldrdoc.gov/fs-1037/fs-1037c.htm (last visited Dec. 18, 2018). The Commission frequently relies upon the *Federal Standard 1037(c): Glossary of Telecommunications Terms* as an authoritative source for the technical meaning of telecommunications industry terms. *See, e.g.*, *FCC Enforcement Bureau & Off. of Gen. Counsel Issue Adv. Guidance for Compl. with Open Internet Transparency Rule*, 26 FCC Rcd. 9411, 9418 (2011); *Study of Digital Television Field Strength Standards & Testing Procedures*, 20 FCC Rcd.

equipment includes "[a] device capable of sending, receiving, or sending and receiving information over a communications channel."[21] Location as the primary controlling factor in whether equipment constitutes CPE is confirmed by Commission precedent which holds that carrier provided/owned equipment can nevertheless be and often is CPE.[22]

Under a plain reading of the controlling federal statute, equipment inside a building occupied by a customer is "equipment employed on the premises of a person (other than a carrier)" and, therefore, constitutes CPE.[23] "Premises" is commonly defined as "[a] house or building, together with its land and outbuildings, occupied by a business or considered in an official context."[24] "The term 'person' includes an individual, partnership, association, joint-stock company, trust, or corporation."[25] Therefore, when equipment is located in a building occupied by a business (other than the carrier), it is, by definition, CPE.

This conclusion applies equally to a premises owned by a single customer or a multi-tenant premises housing a customer and owned by a non-customer landlord. Either way, the equipment

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19504, 19570 (2005); *In re Local Competition & Broadband Reporting*, 15 FCC Rcd. 7717, 7767 (2000); *see also Federal Standard 1037(c): Glossary of Telecommunications Terms*, Introduction, https://its.bldrdoc.gov/fs-1037/fs-1037c.htm ("All Federal departments and agencies shall use it [Federal Standard 1037(c)] as the authoritative source of definitions for terms used in the preparation of all telecommunications documentation. The use of this standard by all Federal departments and agencies is ***mandatory.***" (emphasis in original)).

[21] *Federal Standard 1037(c): Glossary of Telecommunications Terms*, https://its.bldrdoc.gov/fs-1037/fs-1037c.htm (last visited Jan. 2, 2019).

[22] *See In re Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Service (Second Computer Inquiry)*, Seventh Report and Order, FCC 86-17, 1986 WL 292558, ¶ 1 n.1 (FCC Jan. 23, 1986).

[23] *See* 47 U.S.C. § 153(16).

[24] *See* https://en.oxforddictionaries.com/definition/premises.

[25] 47 U.S.C. § 153(39).

is employed in a building, not owned or operated by the carrier, which is occupied by the business customer. Therefore, it meets the definition of section 153.

BellSouth's parent company (AT&T Inc.) as well as other members of the telecommunications industry, agree. Specifically, in a recent case before the Eight Circuit the United States Telecom Association, AT&T, Verizon, and the Voice on the Net Coalition, Inc. (an association of VoIP providers) confirmed that an IVoIP provider's network ends ***outside*** the customer's home and thus excludes equipment located inside the customer's premises, such as IP/TDM converters, routers, gateways, or other IP equipment. *See Charter Adv. Servs. (MN), LLC v. Lange*, 8th Cir. Case No. 17-2290, *Br. of Pls.-Apps.* at 32 ("As a matter of law, Charter's network begins … outside the consumer's home, where the voice signals enter Charter's network in IP[.]"); *see also Charter Adv. Servs. (MN), LLC v. Lange*, 8th Cir. Case No. 17-2290, *Br. of U.S. Telecom Assoc., AT&T, Inc., Verizon, and Voice of the Net Coalition in Support of Br. of Pls.-Apps.* at 13-14.[26]

[26] Copies of the above-cited briefs from the *Charter* case are attached hereto as Exhibit 1. Courts commonly find that parties and/or their privies are judicially estopped from advancing arguments that are inconsistent with positions upon which they previously prevailed in another forum. *See Marshall v. Honeywell Tech. Sys. Inc.*, 828 F.3d 923, 928 (D.C. Cir. 2016) (holding that judicial estoppel "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." (citing *New Hampshire*, 532 U.S. 752, 749 (2001))); *Bejarano v. Bravo! Facility Servs., Inc.*, 251 F. Supp. 3d 27, 34 (D.D.C. 2017) ("The inconsistent stances can be in the same or different proceedings." (citing *Shea v. Clinton*, 880 F.Supp.2d 113, 117 (D.D.C. 2012))); *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 993 (9th Cir. 2012) ("A party can be estopped by statements successfully advanced in both judicial and administrative proceedings." (citing *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir.1996))); *Maitland v. Univ. of Minn.*, 43 F.3d 357, 364 (8th Cir. 1994) (ruling that parties and those in privity with them may be subject to the judicial estoppel doctrine).

Here, given the above-described position taken by AT&T and other industry participants and associations in the *Charter* case on the location of the demarcation point, which the Eighth Circuit adopted in affirming the district court decision, it would be inconsistent for BellSouth to now advance an argument that equipment transmitting, receiving, or processing IP packets that is

These examples of IP-CPE are consistent with guidance from the Commission. For example, the Commission explained that "[t]he term 'IP-compatible CPE' refers to end-user equipment that processes, receives, or transmits IP packets…. [f]or example, IP-compatible CPE includes, but is not limited to, (1) terminal adapters, which contain an IP digital signal processing unit that performs digital-to-audio and audio-to-digital conversion and have a standard telephone jack connection for connecting to a conventional analog telephone; (2) a native IP telephone; or (3) a personal computer with a microphone and speakers, and software to perform the conversion (softphone)."[27] Hence, any CPE that "processes, receives, or transmits IP packets" should satisfy prong 3 of the IVoIP definition in Subpart 9.3.

Again, this understanding of CPE is consistent with the position that BellSouth's corporate parent AT&T and other industry participants and associations successfully advanced in a recent case before the Eighth Circuit., *Charter v. Lange,* Case No. 17-2290. *See Br. of Pls.-Apps.* at 32-34 (asserting that the eMTA analog to IP converter device that Charter provides to its VoIP customers is "customer premise equipment" as a matter of law); *see also Br. of U.S. Telecom Assoc., AT&T, Inc., Verizon, and Voice of the Net Coalition in Support of Br. of Pls.-Apps.* at 13-14 (adopting and supporting Charter's position on the status of the IP to analog converters as CPE).[28]

Accordingly, for all of the foregoing reasons, the Districts respectfully request that the Commission issue a declaration finding that all equipment that transmits, processes, or receives IP

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located on or in the customer's premises is nevertheless on the carrier's side of the demarcation point.

[27] *IP-Enabled Services,* Commission's First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 10245, n.77 (2005).

[28] *See supra* note 31 and Exhibit 1.

packets located on or within the customer's premises is presumptively on the customer's side of the network and thus qualifies as IP-CPE for purposes of applying the definition of IVoIP in 47 C.F.R. § 9.3.

B. There Is No Basis For The Commission To Conclude That The Communications Act Preempts The ETSA.

The district court did not refer to the Commission questions about preemption, and the Commission therefore should not consider those questions. Moreover, as a pure question of law, the question of whether the Communications Act preempts the ETSA is not one within the particular expertise of the Commission. Indeed, the district court can and should resolve such a dispute. Finally, even if the Commission were to consider the preemption questions, it should conclude that the Communications Act does **not** preempt the ETSA.

1. The Commission should not consider preemption questions as part of this proceeding.

a. The district court did not refer preemption questions to the Commission.

The district court did not refer preemption questions to the Commission. Instead, it only referred to the Commission questions about the meaning of IVoIP under Section 9.3. The doctrine of primary jurisdiction permits a court to "route the threshold decision **as to certain issues** to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved."[29] Primary jurisdiction is a flexible concept that permits a court to refer out certain issues requiring the specialized competence of an administrative body, while at the same time retaining jurisdiction over other issues that are within the federal judiciary's

[29] *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1162 (9th Cir. 2007) (quote omitted; emphasis added); *Arsberry v. Ill.*, 244 F.3d 558, 563 (7th Cir. 2001).

conventional competence.[30] As these cases make clear, a primary jurisdiction referral is limited to the issues referred, rather than to other issues that might arise in the case.

Here, the district court did not refer preemption questions to the Commission. In its decision, the district court noted BellSouth's contention that the "primary jurisdiction doctrine applies and that the Districts' proposed classification of VoIP service should be referred to the FCC, together with whether the ETSA's provisions regarding 911 fees are preempted by federal law."[31] However, the district court then focused its analysis entirely on whether the "proper technical classification of VoIP service" justified invocation of the doctrine of primary jurisdiction.[32] The district court did not conduct any analysis of or make any conclusions about whether it should refer preemption questions to the Commission.

The district court's singular focus on the classification of VoIP services, rather than on preemption, demonstrates that the only issues that the district court referred to the Commission relate to the classification of VoIP service. Indeed, the district court's only arguable reference to preemption is its observation that Congress has "precluded charges on VoIP services from exceeding the charges on traditional services."[33] Even that statement, however, demonstrates the district court's focus on whether services qualify as VoIP or as "traditional services." Nothing in the district court's opinion suggests that the district court referred preemption questions to the

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[30] *In re Dep't of Energy Stripper Well Exemption Litig.*, 578 F. Supp. 586, 596 (D. Kan. 1983) ("The Court notes that it can retain jurisdiction of this matter while referring only limited factual questions to the agency."); *Israel, M.D. v. Baxter Labs., Inc.*, 466 F.2d 272 (D.C. Cir. 1972) (remanding case to district court with instruction to retain jurisdiction over plaintiffs' cause of action and refer plaintiffs' drug application to the FDA for approval consideration).

[31] Primary Jurisdiction Referral Order at 7.

[32] *Id.*; *see also generally id.* at 7-14.

[33] *Id.* at 11.

Commission. The Commission must necessarily limit its review to the issues that the district court referred to it.

b. The district court is the appropriate forum for resolution of a pure question of law that arose in the Alabama Action.

The district court's decision not to refer preemption makes sense because the district court is better suited than the Commission to resolve preemption issues. The resolution of those issues requires an understanding of exactly how the ETSA has been applied in Alabama and how the Districts propose that it be applied. Moreover, the preemption questions are questions of law that the district court can and should resolve.

Courts have held that "the question of preemption of state law…is not an area in which the FCC has any special competence or expertise."[34] To the contrary, the judiciary has the expertise necessary to examine Congressional intent and to determine whether a federal statute preempts a state statute.[35] Indeed, the Supreme Court has refused to defer to an agency's conclusion that federal law preempts a state statute.[36] The various United States courts of appeal that have applied that Supreme Court holding have unanimously concluded that they do not owe any deference to preemption decisions by federal agencies.[37]

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[34] *See, e.g., Sprint Corp. v. Evans*, 846 F. Supp. 1497, 1509 (M.D. Ala. 1994).

[35] *See id.* (citing *Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 520 (5th Cir. 1981)).

[36] *See Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009).

[37] *See Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1338 (11th Cir. 2015) ("[D]eference to an agency's ultimate conclusion of federal preemption is inappropriate."); *Grosso v. Surface Transportation Bd.*, 804 F.3d 110, 116–17 (1st Cir. 2015) ("Following *Wyeth*, the courts of appeals have been unanimous in concluding that *Chevron* deference does not apply to preemption decisions by federal agencies." (citing cases)); *Steel Inst. of N.Y. v. City of New York*, 716 F.3d 31, 39–40 (2d Cir. 2013) ("We do not defer to an agency's legal conclusion regarding preemption[.]"); *In re Universal Serv. Fund Tel. Billing Practice Litig.*, 619 F.3d 1188, 1200 (10th Cir. 2010) ("An agency's conclusion that state law is preempted is not necessarily entitled to

These decisions demonstrate that the district court, not the Commission, is the appropriate forum to resolve questions about preemption of the ETSA here. The district court can determine how Alabama courts have applied the ETSA, whether the Districts' proposed interpretation of the ETSA is consistent with applicable state law, and whether the state courts' interpretation of the Alabama statute conflicts in some way with federal law. Indeed, even if the Commission were to devote time and resources to preemption issues, the district court would not owe any deference to that decision, as the Eleventh Circuit has held.[38] Because the district court is the most competent and experienced forum to resolve preemption questions, the Commission should not consider those issues as part of this proceeding.

2. Even if the Commission were to consider preemption questions, it would have no basis to conclude that the Communications Act preempts the ETSA.

Under ETSA, the Alabama legislature empowered the Districts to impose E911 fees on providers of "VoIP and similar services," which encompasses more than Interconnected VoIP.[39] The Districts contend that BellSouth's services constitute interconnected VoIP, and 47 U.S.C. § 615a-1 expressly recognizes state authority to impose E911 fees on interconnected VoIP. However, even if BellSouth's services are not interconnected VoIP but still fall within "VoIP or similar services," then Alabama—and by extension, the Districts—still had the authority to impose 911 fees on those services.

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deference."); *Franks Investment Co. v. Union Pacific Railroad Co.*, 593 F.3d 404, 413–14 (5th Cir. 2010) (ruling that the Surface Transportation Board's "decision regarding the preemptive effect of the ICCTA and the test it uses to determine preemption are not binding on us." (citing *Wyeth*)).

[38] *See Seminole Tribe of Fla.*, 799 F.3d at 1338.

[39] *See* Ala. Code § 11-98-5.1 (repealed effective Oct. 1, 2013) (emphasis added).

BellSouth's arguments before the District Court suggest that federal law, namely 47 U.S.C. § 615a-1, preempts state and local authority to impose E911 fees on services other than those listed in Section 615a-1. For example, BellSouth suggested that Section 615 was the source of authority for states to impose 911 services.[40] Further, BellSouth argued that the scope of voice services subject to 911 funding under Alabama law was limited by the Commission's definition of interconnected VoIP.[41]

BellSouth's preemption argument is incorrect. Assuming, without conceding, that the services provided by BellSouth during the period in question do not constitute interconnected VoIP, as defined by the Commission, that does not mean that the Districts were prohibited from assessing E911 fees on such services. Nothing in Section 615 or other federal law prohibits the Districts from doing so.

The ability of state and local governments to assess 911 fees for purposes of enabling and coordinating essential public safety services implicates two of the quintessential core functions and powers of state and local government—the ability to assess taxes[42] and the ability to preserve and protect public safety—powers that the Constitution does not permit the federal government to encroach upon absent a clear and unambiguous expression of Congressional intent. Federal law

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[40] *See Bellsouth's Memorandum in Support of Motion for Primary Jurisdiction Referral and Stay*, at 4 ("Congress also allowed states to impose 911 charges on users of those 'IP-enabled voice services.'").

[41] *Id*., at fn. 12 ("Under the FCC's order, as codified by Congress, only interconnected VoIP providers must enable 911 emergency calling. That intentional decision to impose 911 obligations on some VoIP providers but not others preempts states from imposing 911 obligations on providers of non-interconnected VoIP services.").

[42] The District does not argue that the 911 fee imposed by Alabama is a "tax" as opposed to a fee. The Alabama Supreme Court has already decided that the 911 fee is a "fee," not a "tax." *See T-Mobile South, LLC v. Bonet*, 85 So. 3d 963, 985 (Ala. 2011). Rather, the District asserts that the authority to impose a fee arises from a state's inherent authority to tax.

has not encroached upon these powers to limit a state's ability to impose E911 fees on services that are not interconnected VoIP, commercial radio service, or local exchange service.

In particular, 47 U.S.C. § 615a-1(f)(1) does not limit Alabama's ability to impose E911 fees on voice services that may not qualify as "interconnected VoIP" under federal law but qualify as "VOIP or similar services" under Alabama law. As a basic matter of Constitutional law, states have the power to tax subjects within their sovereign borders.[43] Indeed, a state's power to tax is one of its most traditional or core functions. In general, that power is limited only when Congress preempts a state tax or fee or when the tax or fee violates the dormant commerce clause.

Perhaps even more fundamental than the power to tax is the inherent power of states to protect public safety.[44] At its heart, the ability of states to assess E911 fees is critical to enabling them to effectively carry out the vital activities necessary to protect public safety and respond to emergency conditions. [45]

a. Congress Has Not Preempted States From Assessing 911 Fees on Telephone Service That is Neither IVoIP Nor Local Exchange Service

[43] *See Curry v. McCanless*, 307 U.S. 357, 366 (1939) ("The power to tax 'is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.'") (quoting *McCulloch v. Maryland*, 17 U.S. 316, 429 (1819)).

[44] *See Chicago, B&Q Ry. Co. v. People of State of Illinois*, 200 U.S. 561, 592 (1906) ("We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or **the public safety**.") (emphasis added).

[45] *See In re IP-Enabled Servs. & E911 Requirements for IP-Enabled Serv. Providers*, 20 FCC Rcd. 10245, 10249 (2005) ("Responsibility for establishing and designating PSAPs or appropriate default answering points, purchasing customer premises equipment (CPE), retaining and training PSAP personnel, purchasing 911 network services, and implementing a cost recovery mechanism to fund all of the foregoing, among other things, falls squarely on the shoulders of states and localities.").

At the outset, in all preemption cases—particularly those involving traditional state powers such as taxation of subjects within their sovereign borders—there is a presumption against preemption.[46] Only a clear, manifest statement by Congress to preempt state law will overcome this presumption.[47] Consistent with this presumption, when addressing issues of preemption of traditional, core state powers, such as the powers to tax and protect public safety, Congress must make its intention to do so "unmistakably clear in the language of the statute."[48] This plain statement rule is nothing more than an acknowledgment that the states retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.[49] Here, there is no clear or manifest statement by Congress preempting Alabama's ETSA and, thus, preemption does not apply.

A state's inherent right to tax is only limited by Congress's power to regulate interstate commerce.[50] Congress may pass laws that limit a state's right to impose taxes on matters within interstate commerce.[51] Whether a federal statute prohibits a specific state tax—assuming Congress is properly exercising its power to regulate interstate commerce—is a question of preemption.[52]

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[46] *See Commissions Import Export S.A. v. Republic of the Congo*, 757 F.3d 321, 333 (D.C. Cir. 2014).

[47] *See id*.

[48] *Gregory v. Ashcroft*, 501 U.S. 452 (1991), quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989).

[49] *Gregory*, 501 U.S. at 461.

[50] *See American Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 434 (2005).

[51] *See Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 12 (1983) (upholding a federal statute prohibiting state taxes on gross receipts from air transportation).

[52] *See id.* at 9 ("These appeals present the question whether 49 U.S.C. § 1513(a) preempts a Hawaii statute that imposes a tax on the gross income of airlines operating within the State.").

In general, Congress can preempt a state law in three different ways: (1) When Congress specifically preempts state law ("express preemption"); (2) When Congress intends the federal government to occupy an entire field, such that any state regulation in that field is completely preempted ("complete preemption" or "field preemption"); and (3)When state law conflicts with federal law, *i.e.*, where a party cannot possibly comply with both state and federal law or where state law thwarts federal objectives ("conflict preemption").[53] None of these three scenarios applies here.

i. Congress has not expressly preempted the ETSA

It is well settled law that if Congress intends to preempt a power traditionally exercised by a state or local government, "it must make its intention to do so unmistakably clear in the language of the statute."[54] This case deals with not just one, but two fundamental and traditional state powers—the power to tax and the power to preserve and protect public safety.

The Commission itself has recognized that federal law builds on, and does not detract from, the underlying authority of state and local governments to require provision of E911 services and to impose fees and taxes on a range of E911 service providers, and that this authority predates the Commission's adoption of E911 service requirements for interconnected VoIP providers and the enactment of Section 615:

> The availability of this critical service is due largely to the efforts of state and local authorities and telecommunications carriers, who have used the 911 abbreviated dialing code to provide access to increasingly advanced and effective emergency service capabilities. *Indeed, absent appropriate action by, and funding for, states and localities, there can be no effective 911 service. Responsibility for establishing and designating* PSAPs or appropriate default answering points, purchasing customer premises equipment (CPE), retaining and training PSAP personnel,

[53] See *English v. General Elec. Co.*, 496 U.S. 72, 78–79 (1990).

[54] *Id.* at 460.

> purchasing 911 network services, *and implementing a cost recovery mechanism to fund all of the foregoing, among other things, falls squarely on the shoulders of states and localities*.[55]
>
> ***
>
> We believe that the requirements we establish today will significantly expand and improve interconnected VoIP 911 service while substantially reducing the threat to 911 funding that some VoIP services currently pose. *First, we recognize that while some state laws today may already require 911 funding contributions from providers of interconnected VoI*P, interconnected VoIP providers may not be covered by existing state 911 funding mechanisms in other states.[56]

While the focus of the *E-911 IP-Enabled Order* was on interconnected VoIP services, the key issue for purposes of this discussion is that the FCC recognized the underlying authority of states to adopt requirements—such as fees and taxes—to provide a funding mechanism for the support of E911 services, and nothing in that *Order* implied, let alone less plainly stated, a limitation on the ability of state and local governments to impose fees on any communications service used to provide E911. This is precisely what Alabama did in enacting a requirement in the ETSA statute that "each provider of VoIP or similar service" be assessed a 911 fee, and Alabama did so on May 5, 2005,[57] which was prior to the FCC's release of its *E-911 IP-Enabled Order* in June 2005, and three years prior to the enactment of Section 615a-1a(f)(1) in 2008.

Moreover, Congress has not expressly prohibited the imposition of E911 fees on voice services that do not meet the federal definitions of interconnected VoIP or local exchange service. To the contrary, 47 U.S.C. § 615a-1(f)(1) states:

> Nothing in this Act, the Communications Act of 1934 (47 U.S.C. 151 et seq.), the New and Emerging Technologies 911 Improvement Act of 2008, or any

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[55] *In the Matter of E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, Report and Order (E-911 IP-Enabled Order), ¶ 7, released June 3, 2005(emphasis added).

[56] *Id*. at ¶ 52 (*emphasis* added).

[57] Ala. Code § 11-98-5.1

> Commission regulation or order shall prevent the imposition and collection of a fee or charge applicable to commercial mobile services or IP-enabled voice services[58] specifically designated by a State. . . .

There is nothing in this statutory language that evidences an intent by Congress to preempt state law, let alone an unmistakably clear statement of such intent that would satisfy the *Gregory* standard on a matter, such as this, involving a traditional state function. Indeed, this provision does not impose any prohibition on a state's ability to assess a tax or fee on the provision of any particular types of 911 services.[59]

In fact, the statute recognizes the ability of states to impose E911 fees with respect to two services—commercial radio services and IP-enabled voice services—and provides that the Communications Act of 1934 "shall not prevent the imposition and collection of a fee or charge."[60] This statute does not remove state and local government authority and discretion to impose E911 fees on any voice service that can be used to call for E911 support. Rather, recognizing that some states had appropriately and wisely imposed E911 fees on providers of interconnected VoIP, Congress mandated that all interconnected VoIP providers offer access to 911 services and reaffirmed states' ability to impose fees on that interconnected VoIP providers.

In no way can Section 615a-1a(f)(1) be deemed to satisfy the elevated *Gregory* standard of clear statement of legislative intent necessary to preempt the ability of states to assess such fees

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[58] Section 615(b)(8) indicates that the term "IP-enabled voice service" has the meaning given the term "interconnected VoIP service" by section 9.3 of the Federal Communications Commission's regulations (47 CFR 9.3).

[59] To be sure, the next clause of this Section of 615 a-1(f)(1) imposes a limitation on the ability of states to assess different fees on IP-enabled services than they assess on the same class of telecommunications services, but there is no prohibition on the inherent ability of states to asses fees in the first instance.

[60] 47 U.S.C. § 615a-1a(f)(1).

on other types of communications services that enable customers to access and utilize 911 capabilities. To do otherwise, would mistakenly interpret Section 615 as the *source* of state authority to require the provision of E911 service and to impose fees on E911 services to pay for such services. States have an inherent ability to impose taxes, and they do not have to rely on Congressional grants of authority to tax. Specifically, states, such as Alabama, do not have to rely on Section 615a-1 for the authority to levy E911 fees on voice service. Thus, the statute's limited recognition of the ability to impose fees on commercial mobile services and IP-enabled services does not limit a state's power to impose fees on other services.

The ruling in *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999) is instructive on this point. In *City of Dallas*, the court, looking to *Gregory*, rejected the Commission's contention that a provision of the Telecommunications Act of 1996, Section 653(c)(1)(C), prohibited state and local governments from requiring OVS operators to obtain a franchise as a matter of state or local law because it expressly removed a federal requirement that open video service (OVS) providers obtain a local franchise:

> [F]ranchising authority does not depend on or grow out of § 621. While § 621 may have expressly recognized the power of localities to impose franchise requirements, it did not create that power, and elimination of § 621 for OVS operators does not eliminate local franchising authority.
>
> The Commission could come to a contrary conclusion only by reading its preemptive authority broadly. But § 601(c) precludes a broad reading of preemptive authority, as does *Gregory*, 501 U.S. at 460, 111 S.Ct. 2395 (opining that courts must "assume Congress does not exercise [the power to preempt] lightly" and must require Congress to state clearly its intent to preempt).[61]

Here, as in *City of Dallas*, the authority of states and local governments at issue does not depend on or grow out of federal law. While Section 615a-1a(f)(1) may have expressly

[61] *City of Dallas*, 165 F.3d at 348.

"recognized the power" of localities to impose fees or taxes on 911 service providers, it did not "create that power." As a result, absent a clear and unmistakable statement of intent to preempt this authority, states and local governments retain this authority.

ii. Congress has not preempted the field.

As discussed above, Congress has not even implicitly, much less clearly and unambiguously, as *Gregory* requires, expressed an intent to completely preempt the entire field of E911 funding. Complete Field Preemption "may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation."[62] The Federal Communications Act establishes a dual scheme of regulation, with the Commission regulating interstate telecommunications activities and states primarily regulating intrastate communications. While the Commission has concluded that VoIP service is largely an interstate service, E911 services are inherently local in nature, and Congress has specifically left the issue of E911 fees and the funding of emergency telephone services to the states. Specifically, 47 U.S.C. § 615a-1(f)(1) explicitly recognizes that states can impose 911 fees on certain types of services—commercial mobile radio services and IP-enabled voice services—and contains no limiting language on the scope of other types of services that can properly be subject to such fees under state law.[63]

Also, as demonstrated above, the Commission has recognized that the primary responsibility for devising and implementing a cost recovery mechanism to fund 911 "falls

[62] *California Fed. Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987).

[63] In fact, a close reading of the statute demonstrates that Congress intended that the FCC have a relatively limited role with regard to the development and assessment of 911 fees by state and local governments.

squarely on the shoulders of states and localities."[64] It is therefore entirely reasonable and appropriate for states, such as Alabama, to seek to recover E911 fees on any entities that offer E911 capabilities, thereby imposing additional burdens on the system, including not just interconnected VoIP providers, but also providers of similar services.

Under *Gregory*, the requirement of a clear statement of Congressional intent to preempt state and local government authority to impose 911 fees and taxes is paramount, and even if there were a conflict with federal regulations or policies—which is not the case, such a conflict would not be sufficient to support preemption.

For example, in *City of Dallas*, the Commission argued that that to achieve Congress's deregulatory objectives, it was necessary to interpret the statute to preempt local franchising authority over OVS providers. In rejecting this argument, the court held that "[w]hile the agency's argument is plausible, it does not affect our holding. The statutory text read in the light of *Gregory"* dictates "against implied preemption."[65] Similarly, in *Missouri Municipal League v. Nixon*, 541 U.S. 125 (2004), the Supreme Court recognized that a Missouri statute that prohibited municipalities from providing telecommunications services was inconsistent with federal purposes and policies, but the Court nevertheless upheld the statute because Congress had not made its intent to preempt laws such as the Missouri law at issue sufficiently clear to meet the *Gregory* plain statement standard.

iii. There is no conflict between the Communications Act and the ETSA that would give rise to conflict preemption.

[64] *Id.* ¶ 7.

[65] *City of Dallas,* at 349.

A bedrock principle of statutory interpretation is that statutes should be read so as to minimize preemption and conflict to the extent possible.[66] In this instance, nothing in the ETSA conflicts with federal law to the point of preemption. The ETSA does not attempt to regulate VoIP services, redefine Interconnected VoIP, or require any IP-based service that is not Interconnected VoIP to have the ability to call E911—some of the primary goals of federal communications regulations.

These three goals—regulating VoIP, defining Interconnected VoIP, and requiring Interconnected VoIP service to call E911—are not in any way hindered by the imposition of 911 fees telephone services that are neither interconnected VoIP nor local exchange service. First, charging E911 fees is not an attempt to regulate VoIP or other telephone services. The purpose of imposing E911 fees is to fund emergency services, not to regulate telephone services. The Alabama statute did not impose a requirement on providers of non-interconnected VoIP services to provide E911 services, it simply required such entities that elected to offer E911 connectivity of their own accord to properly compensate the State's E911 districts for the fair costs as reasonably determined by the districts. Second, the Alabama statute does not attempt to define VoIP or Interconnected VoIP. The Commission has defined both VoIP and Interconnected VoIP.[67] Nothing about the Alabama E911 fee scheme conflicts with either of those definitions. Third, the

[66] *See Conference of State Bank Sup'rs v. Conover*, 710 F.2d 878, 882 (D.C. Cir. 1983) ("In the construction of such laws, courts indulge a rule of construction (not a presumption) which avoids finding a conflict if at all possible.").

[67] The FCC generally defines VoIP as "any IP-enabled services offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony." *In re IP-Enabled Servs. & E911 Requirements for IP-Enabled Serv. Providers*, 20 FCC Rcd. 10245 (2005). Within this broad definition of VoIP, the FCC has specifically defined Interconnected VoIP. *See* 47 C.F.R. § 9.3.

Alabama statute does not require any provider to offer E911 access—it simply imposes E911 fees on those services that do, in fact, allow access to E911.

In summary, because the ETSA does not hinder or conflict with any of these three important federal objectives, there is no basis for finding that federal law preempts the ETSA's imposition of 911 fees on VoIP or similar service.

iv. Alabama's E911 Fee Structure Does Not Violate the Dormant Commerce Clause.

In addition to Congress' positive power to regulate interstate commerce, the Constitution provides a "negative command" in the form of the dormant Commerce Clause that prevents states from imposing taxes and fees that discriminate against or place excessive burdens on interstate commerce.[68] When evaluating whether a tax violates the dormant commerce clause, courts apply the "internal consistency" test, which "looks to the structure of the tax at issue to see whether its identical application by every state in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate."[69] The internal consistency test

> allows courts to distinguish between (1) tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States, and (2) tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes.[70]

Alabama's 911 fee statute prior to October 2013 did not violate the dormant commerce clause. Alabama's statutory scheme imposed 911 fees only on "telephone service in the

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[68] *See American Trucking*, 545 U.S. at 433–34.

[69] *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 185 (1995); see also *Comptroller of Treasury of Md v. Wynne*, 135 S.Ct. 1787, 1802 (2015).

[70] *Wynne*, 135 S.Ct. at 1802.

municipality or county" where the local governments choose to levy 911 fees.[71] As a result, the 911 fee did not discriminate against interstate telephone service because the nexus and focus of the fee was on the geographic location of the service user, not whether the service crosses state lines. In particular, the 911 fee did not discriminate between purely local telephone service and long-distance telephone service, which could potentially be seen as discrimination between interstate and intrastate telephone service. Rather, the statute was focused on access to the local public safety answering point (PSAP). As a result, the 911 fee's relation to interstate commerce was only incidental to a particular service user having the capability of making interstate phone calls, in addition to the necessary ability to call 911.

Moreover, if a 911 fee with these attributes was imposed in every state, no service user would encounter double taxation. Each service user would only pay a 911 fee to the county or municipality where it receives telephone service. No other county or municipality in another state could lay claim to the 911 fee paid for service in another state. Alabama's 911 fee structure therefore is fairly apportioned to services provided in Alabama—not any other state—and it poses no risk for double taxation.

b. Section 615(A) Regulates the Amount of a 911 Fee for Particular Types of Telephone Service, Not the Number of 911 Fees that a State Statute Can Assess on each Service Type.

A state statute assessing a 911 fee on a per-telephone number basis for IP-enabled services and on a per-access line basis for local exchange service is not preempted by 47 U.S.C. § 615a-1(f)(1). The text of this statute indicates that Congress intended it to be a regulation of the "amount of any such fee or charge," not the number of fees or charges billed. In other words, the statute

[71] Ala. Code § 11-98-1(8) (repealed effective Oct. 1, 2013).

regulates the rate of 911 fees—providing that a state, or other subdivision, may not impose different rates for local exchange and IP-enabled customers.

Legislative history supports interpreting "amount of any such fee or charge" as the rate of the 911 fee. The House Report on the bill proposing this change specifically discusses rates, not the number of fees billed:

> It also is possible that some state and local governments might impose such **fees at a rate higher** than those charged on other telephone services, but CBO has no information upon which to make such a judgment at this time. Most states impose 911 fees on wireline and wireless services that are similar, suggesting that such fees on VoIP also would be similar. In total, CBO estimates that the costs to state and local governments from the bill's limitation on fees, while they might grow over time, would likely be small over the next five years.[72]

An example of the types of fees prohibited by this statute would be a 911 fee that was $1.00 for local exchange business subscribers and $2.00 for IP-enabled business subscribers. In this example, the "amount" of the 911 charge would be higher for VoIP subscribers than local exchange subscribers of the same class.[73] However, if the rate for both IP-enabled and local exchange service is the same, then the prohibition in 47 U.S.C. § 615a-1 is satisfied—even if the statute imposing the 911 fee assessed the fee on a per-telephone number basis for IP-enabled services and on a per-access line basis for local exchange service.

The Districts' interpretation is supported by state and Commission reports submitted to Congress. Each year, the Commission submits a "Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charged as mandated by the New and Emerging

[72] H.R. Rep. No. 110-442 at 11 (2007) (emphasis added).

[73] Legislative history indicates that "class of subscribers" refers to business or residential subscribers. H.R. Rep. No. 110-442 at 10 (2007).

Technologies 911 Improvement Act of 2008."[74] As part of this Report, the Commission solicits and submits to Congress survey responses from states.[75] One of the survey prompts is, "[t]he amount of fees or charges imposed for the implementation and support of 911 and E911 services," which mirrors the language in 47 U.S.C. § 615a-1(f)(1) ("For each class of subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services.").

Alabama's response to this prompt reflects the *rate*, not the basis for calculating the total number of fees imposed on a customer: "*For wired lines*—Local ECDs could impose a charge of up to 5% of the maximum tariff rate on wirelines within their district, except in counties with less than a population of 25,000, which could charge a flat rate of up to $2.00. The charge varied from district to district."[76] This report evidences the Commission's and the State of Alabama's interpretation of the term "fee or charge . . . amount," which is consistent with the Districts' interpretation.

Finally, the Commission, in the *IP-Enabled* Order, recognized that states may need to explore assessing 911 fees on a different basis for interconnected VoIP customers. The Commission stated: "Because 911 contribution obligations are typically assessed on a per-line basis, states may need to explore other means of collecting an appropriate amount from competitive LECs on behalf of their interconnected VoIP partners, such as a per-subscriber basis."[77] In other words, the Commission recognized that 911 fees are typically assessed on a per-

[74] *See* Ex. 3, FCC Report to Congress.

[75] *See* Ex. 2, Alabama Survey Response.

[76] *See* Ex. 2, Alabama Survey Response.

[77] *See In re IP-Enabled Servs. & E911 Requirements for IP-Enabled Serv. Providers*, 20 FCC Rcd. 10245, 10274 n.163 (2005).

line basis, yet it proposes that states consider assessing 911 fees for VoIP on a "per-subscriber basis." Although the *IP-Enabled* Order was rendered before § 615a-1 was adopted, this language from the *IP-Enabled* Order indicates that the Commission did not consider assessing 911 fees for VoIP on a different basis than local exchange service as inequitable or somehow unfair.

Moreover, there are sound technological reasons to permit states to distinguish between VoIP and other types of telephone service in assessing 911 fees. Traditional exchange access service, as its name suggests, places physical limits on the number of simultaneous calls that a customer can make to 911 at any one time. That is, there is an upward bound on theoretical burden that a PRI circuit or other exchange-access service places on the 911 system. On the other hand, VoIP service is not so limited. While carriers might, as a matter of contract, impose limits on the number of calls a customer can make, there is no physical or technological limit. Indeed, by its nature VoIP service is flexible and scalable, and a customer can arrange for burstable service using any internet service available to it. Therefore, VoIP service places a much higher theoretical maximum burden on the 911 system in any particular jurisdiction, and a state acts justifiably and consistently with the text and purpose of the Communications Act if it imposes different fees on the two different types of service.

CONCLUSION

For the reasons discussed above, the Districts respectfully request that the Commission declare as follows:

1. All equipment located on or within the customer's premises that transmits, processes, or receives IP packets is presumptively on the customer's side of the network and qualifies as IP CPE for purposes of applying 47 C.F.R. § 9.3.

2. The ultimate legal issue as to whether Alabama's ETSA is preempted by federal law was not clearly referred to the Commission and, further, is not within the special competence and experience of the Commission—therefore, the Commission declines to reach the ultimate issue

of preemption and instead defers that determination, if deemed necessary, to the district court, in its discretion.

3. Alternatively, to the extent that the commission concludes that the ultimate legal issue of federal preemption of Alabama's ETSA was referred to it and that the Commission is the most appropriate forum to make that determination, then neither 47 U.S.C. § 615a-1(f)(1) nor any other federal law prohibits state and local governments from assessing fees or surcharges on voice services used to support the delivery of E911 emergency services where such voice services do not meet the FCC's definitions of interconnected VoIP or local exchange access but the voice service allows the user to access E911 services and the fees and surcharges charged are used to support the delivery of E911 emergency services.

4. Alternatively, to the extent that the commission concludes that the ultimate legal issue of federal preemption of Alabama's ETSA was referred to it and that the Commission is the most appropriate forum to make that determination, then assuming the rate of the E911 fee is the same for IP-enabled voice services and local exchange services, a state or local government would not violate 47 U.S.C. § 615a-1(f)(1) if the state or local government required IP-enabled customers to pay an E911 fee for every telephone number capable of accessing the public switched telephone network while customers with local exchange service were required to pay a fee based on the number of access lines provided by their service.

Respectfully submitted.

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